FEDERAL RULE 23—THE EARLY YEARS

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As Professor Yeazell has shown, present Federal Rule 23 has a surprisingly long lineage, but it remains a work in progress. One of its "roots," the aptly named "Bill of Peace," has been described by Professor Rowe. My task is to examine the original version of Rule 23, as it appeared in the new Federal Rules in 1938. That version served until the amendment of Rule 23 which became effective in 1966 as part of a general revision of the Federal Rules.

With the benefit of hindsight, we can now say that the original rule had a number of weaknesses, some of which were addressed in 1966. Yet it would be inappropriate merely to criticize the rule. The 1938 Federal Rules as a whole, including Rule 23, represented an enormous effort to organize an untidy body of procedural law into a coherent set of statements which would govern the conduct of all civil litigation in the federal courts. It would be presumptuous to suggest that every issue should have been worked out to our present satisfaction.

The immediate predecessor of Rule 23 was Equity Rule 38. In words well suited to the sheltering environment of equity, it quite simply provided: "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."[1] This formulation gave the Chancellor considerable discretion to determine the suitability of a particular controversy for class treatment, discretion presumably informed by the accumulation of precedent and usage. As we will see, much of this language found its way into Rule 23.

Before we turn to the content of the 1938 Rule 23, we might take note of a key principle which guided the drafting process. The drafters understood that the rules which they would propose should be rules of procedure only, not rules which would cause changes in substantive rights.[2] In the context of class actions, where the rights of those not before the court might be affected, this principle had obvious importance. The result was said to be an attempt to categorize the types of cases which might proceed as class actions, based on the existing practice.[3] One could describe the proposed Rule 23, therefore, as primarily an attempt to codify, not to

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1. *See* JAMES LOVE HOPKINS, THE NEW FEDERAL EQUITY RULES 231 (1930).

2. *See* 2 JAMES W. MOORE, FEDERAL PRACTICE 2283 (1938).

3. *See Developments in the Law: Multiparty Litigation in the Federal Courts,* 71 HARV. L. REV. 874, 930 (1958) (citing Edson R. Sunderland, *The New Federal Rules,* 45 W. VA. L.Q. 5, 16–17 (1938)) [hereinafter *Developments in the Law*].

reform.[4]

One other background point may be worthy of note. The 1938 Rules abolished the distinction between actions at law and those in equity, creating instead a single form of civil action. The class action device had previously been exclusively the province of equity, which may have influenced its development in subtle ways. From 1938 forward, any such mystique was lost and the scope of debate about the proper use and function of the class device was, it would seem, widened.

The 1938 version of Rule 23 read in significant part as follows:

> a. Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued when the character of the right sought to be enforced for or against the class is
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> (1) joint, or common, or secondary in the sense that an owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it; or
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> (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or
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> (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.
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> b. [Provision relating to shareholder suits].
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> c. Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule, notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraphs (2) or (3) of subdivision (a), notice shall be given only if the court requires it.[5]

A number of important concepts are embedded in the introductory portion of subdivision (a). There must be a "class" and its members must be "so numerous as to make it impracticable to bring them all before the court." One or more of the members of the class may sue or be sued on behalf of all only if the representative or representatives "will fairly insure the adequate representation of all." And since the words "sue or be sued" are used, there can be plaintiff classes and defendant classes. The matter of notice is considered only in subdivision (c) and then only in a very limited context. All of the Rule 23(a) concepts, except adequacy of representation, had been articulated in Equity Rule 38; and adequacy of representation was a well understood, if unwritten, prerequisite to class status under Rule 38.[6]

A categorization of acceptable classes—described in terms of the character of the interests to be litigated—occurs in the three numbered paragraphs of subdivision (a). The organizing theme, according to Professor Moore, was the

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4. *See generally id.* at 929.

5. *See* FED. R. CIV. P. 23 (1940).

6. *See, e.g.,* Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921).

"jural relationships" among the members of the class.[7] The three classes were described by Professor Moore as, respectively, a "true" class, a "hybrid" class and a "spurious" class.

In a "true" or (a)(1) class, the rights sought to be enforced were shared rights—the "jural relationship"—and joinder of all members of the class would be required to adjudicate those rights.[8] The (a)(1) class action was thus a substitute for mandatory joinder where the members of the class were so numerous as to make such joinder impracticable. In the case of the "hybrid" or (a)(2) class, while the rights of the class members might be several and not joint, those rights would relate to some specific property, often a fund, over which the court would assume what would be (or at least would be akin to) in rem jurisdiction.[9] The jural relationship would arise from the fact that the members of the class had "several" (rather than joint) interests involving some distinct property and the interests of all of them with respect to that property might be affected by the outcome of the litigation.

In the "spurious" class under (a)(3), if there was any "jural relationship," it was a fiction created to justify bringing together those who had no prior relationship whatsoever.[10] What would join the members of an (a)(3) class together was the happenstance (and not a relationship) that determination of their "several" rights would depend at least in part on resolution of a common question of law or fact, and then only if it were further supposed that the members would seek common relief.[11] In this case, allowing the action to proceed as a class action would serve (imperfectly) as a kind of permissive joinder mechanism by which strangers might come together to litigate. It might be added that if the new rule was a codification, there was plenty of precedent for the first two types of classes; but the same could not so easily be said of the third category. Indeed, doubt was expressed that the bringing together of simple money damage claims, bound only by a common question, could be considered a proper class at all.[12]

In practice, identification of the members of a class of the "true" and "hybrid" categories was relatively straightforward since a relationship of some sort would have existed among the members prior to the institution of the litigation. Moreover, representation and adequacy of representation (except perhaps in the context of a defendant class) also seemed to be less of an issue in these types of class actions compared with the (a)(3) variety, perhaps again based on the fact of the preexisting

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7. *See* MOORE, *supra* note 2, at 2235.

8. *Id.* at 2235–39.

9. *Id.* at 2239–41.

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> The spurious class suit was a permissive joinder device.... There was no jural relationship between the members of the class; unlike, for example, the members of an unincorporated association, they had taken no steps to create a legal relationship among themselves. They were not fellow travelers by agreement. The right or liability of each was distinct. The class was formed solely by the presence of a common question of law or fact. When a suit was brought by or against such a class, it was merely an invitation to joinder—an invitation to become a fellow traveler in the litigation, which might or might not be accepted. It was an invitation and not a command performance.

See 3 JAMES W. MOORE, FEDERAL PRACTICE 2601–2603 (2d ed. 1969).

11. *Id.* at 2241–45.

12. *See, e.g.*, Farmers Co-Op. Oil Co. v. Socony–Vacuum Oil Co., Inc., 133 F.2d 101, 104–05 (8th Cir. 1942).

relationship. And the nature of the rights at stake in (a)(1) and (a)(2) litigation made it appropriate (perhaps one could say necessary) that all members of the class be bound by the judgment, whereas in the case of an (a)(3) class, the prevailing view (as noted below) was that absent members of the class would not be bound until they actually appeared of record in the action.[13]

Pausing here for a moment, one might say that there was something counter-intuitive about all of this. If absent class members are to be bound by a judgment, then adequacy of representation should be of paramount importance. If they are not, one could question whether there really is representation at all, and adequacy might at least seem less significant.[14] Moreover, these considerations would be of particular importance because of the absence of notice. In the case of (a)(1) and (a)(2) classes, the combination of no notice and a binding judgment would appear to require close scrutiny of the adequacy of a class representative; and by the same token, absence of early notice in an (a)(3) situation would seem to have less importance, just as in the case of the adequacy of representation.

It should be recognized that the rule itself was silent as to the effect of a judgment upon rights of absent class members and the scope of a judgment would, in the first instance, be defined in the judgment itself. The silence of the rule on the matter of who would be bound by a judgment was thought to be a necessary concession to the requirement that the rules not determine substantive rights.[15] This concession may, however, have been more symbolic than real since Professor Moore, for example, considered the method of categorization in subdivision (a) to bear upon who would be bound.[16]

Most of the interesting issues under the 1938 version of Rule 23 arose in the context of the spurious class action under (a)(3). A large part of the discussion centered on what came to be known as one way intervention. To understand that phrase, one should first recall that the rule did not explain who would be bound by a judgment in a class action. And as a corollary, it said nothing about how an absent class member could take advantage of a judgment favorable to his or her interest. Moreover, the only reference in the rule to notice was in the context of a compromise or dismissal; and as to an (a)(3) action, even notice of a compromise or dismissal was to be given only if the court required it.

Consider also the belief that the Constitution requires some form of notice and an opportunity to be heard as the normal minimal safeguard afforded one whose

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13. *See, e.g.*, York v. Guaranty Trust Co., 143 F.2d 503, 529 (2d Cir. 1944) (dictum), *rev'd on other grounds*, 326 U.S. 99 (1945). Interestingly, in one of the earliest cases under the new rule, the Court of Appeals for the Seventh Circuit assumed that absent class members would be bound by a judgment in an (a)(3) action, but affirmed dismissal of the class averments on grounds of the inadequacy of the named plaintiffs to represent the class. Weeks v. Bareco Oil Co., 125 F.2d 84 (7th Cir. 1941).

14. In this case, however, the defendant would still enjoy the stare decisis benefit of a decision in its favor, with potentially negative consequences for future plaintiffs.

15. *See Developments in the Law*, *supra* note 3, at 934 (citations omitted).

16. In some cases, there was doubt as to which subdivision of Rule 23(a) should apply. *See, e.g.*, Deckert v. Independent Shares Corp., 27 F. Supp. 763 (E.D. Pa. 1939), *rev'd*, 108 F.2d 51 (3d Cir. 1939), *rev'd*, 311 U.S. 282 (1940), *on remand*, 39 F. Supp. 592 (E.D. Pa. 1941), *rev'd sub nom.* Pennsylvania Co. for Ins. on Lives v. Deckert, 123 F.2d 979 (3d Cir. 1941). As described below, the outcome of this inquiry would have an important consequence in terms of who would be bound by any judgment.

interests might be the subject of a judgment.[17] Although there was certainly precedent (and perhaps a rationale) among the so-called association and common fund cases for the proposition that a judgment in a class action could be binding on absent class members who had received no personal notice,[18] no justification seemed to exist for such a result in the case of strangers bound together only by a "common question" affecting their several rights.[19]

Against this background, it was generally understood that if a plaintiff class action under (a)(3) ended in victory for the defendant, the judgment would not bind absent class members who had not intervened and to whom no notice had been sent.[20] Subject to statute of limitations issues, the absent class member could still sue on his or her claim. The other side of the coin was that absent class members would not obtain the advantage of a ruling favorable to their claims unless they intervened. This led to the practice of giving notice to absent class members of a favorable verdict and allowing them to intervene to make a claim before the judgment for the named plaintiff became final. Thus, "one way intervention" was born. In contrast with the opt out procedure under the 1966 amendment, this was an opt in process. The absent class member was given the opportunity and a means to bind the defendant to a result adverse to the defendant; but the successful defendant had no reciprocal right to bind absent members of a plaintiff class.[21]

It is obvious that statute of limitations issues might be raised with respect to those who appeared in court to intervene after the running of the applicable statutory period. If the class action was "spurious," that is, not really a class action, but instead a liberal intervention scheme, would the statute be tolled as to absentees by the filing of the action as a class action? While a good argument could be made against tolling, efficiency dictated that the statute be deemed to have been tolled and it usually was.[22] I hesitate to say "fairness" played any role since what might be thought to be "fair" to one side in the litigation might be unfair to the others.

Let me stand back now and address some larger questions which sometimes protruded into the debate over the rule. For example, should the objective of rulemaking be the achievement of a neutral set of guides for the conduct of litigation or should the class action device be considered an instrument of public policy? If the latter, to what end? And at what price in terms of individual rights? Should efficiency (economy) be considered as an independent objective? Again at what price?

These types of questions tended not to be of particular concern in the context of (a)(1) and (a)(2) classes. It was recognized that in the case of true and hybrid classes, the class device served an efficiency goal in terms of judicial administration. Indeed, efficiency may have been a secondary consideration to the

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17. *See, e.g.*, Pennoyer v. Neff, 95 U.S. 714 (1877). *See also* Hess v. Pawlowski, 274 U.S. 352, 356 (1927). The due process point is succinctly made in the context of the Fourteenth Amendment in the later decision in Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811–12 (1985).

18. *See* Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921).

19. *See* Hansberry v. Lee, 311 U.S. 32 (1940).

20. *See* James W. Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 GEO. L.J. 551, 570–76 (1937).

21. For a case explaining the rationale, see Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561 (10th Cir. 1961).

22. *See* Arthur John Keefe et al., *Lee Defeats Ben Hur*, 33 CORNELL L. Q. 327, 339–42 (1948).

more pragmatic concern that complete relief in the types of cases fulfilling these definitions demanded a judgment determining the rights of all affected persons. If the members of a class were really so numerous as to make joinder impracticable (perhaps even impossible), then class treatment was the only alternative to no effective adjudication at all. In short, expediency more than efficiency served to justify the class device.

The spurious class action was the focus of the public policy discussion. For example, public policy was said to justify one way intervention. The argument rested on a number of propositions. First, Congress had passed laws regulating conduct. These laws frequently created rights of action for damages resulting from violations of the statutory standards. Private litigation would create a societal benefit since it would serve as an important law enforcement mechanism. Yet in individual cases, the amount of damages might be too small and the questions involved too complex to warrant individual litigation. Thus, the class device would be necessary to attract private litigants, but the (a)(3) class device would only do so if absent class members were allowed to intervene after a verdict against the defendant.[23]

The argument was obviously circular and failed to address the critical issue of lack of mutuality. The desirability of a procedure which would allow judgments to have a mutual effect was recognized in the 1966 amendment.

The possible efficiency gain was touted as a reason for spurious class actions and was consistent with one of the goals of the new federal rules which was to allow different claims to be collected together and litigated in one action whenever the claims rested on a basis which rendered adjudication in one proceeding more efficient than adjudication in multiple proceedings. Courts recognized, however, that a common question of law or fact might in some cases be an insufficient basis to achieve real economies, again a problem more directly addressed by the amendment of Rule 23 in 1966.

The possible limits of the efficiency justification for class treatment are represented today by mass tort class actions and the use of settlement classes. I am aware of no case under the original Rule 23 in which an attempt was made to create what we would call today a mass tort action class. And neither am I aware of any comment (judicial or otherwise) on the use of settlement classes, again as we understand that term to mean a temporary class for settlement purposes only. Thus my segment of the history of Rule 23 sheds no particular light on these contemporary issues.

Let me conclude with the thought that the 1966 amendment of Rule 23 serves as a good guide to the experience accumulated under the rule from 1938 through 1966. The amendment obviously sought to correct shortcomings; but in a larger sense, it reaffirmed the general view that the class action had proven to be a valuable device, worthy of improvement and continuation. Whether the pendulum has now swung too far or is in danger of doing so is the subject of later papers.

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23. *See* Harry Kalven & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941).